INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	6
Reasons for granting the writ	6
Appendix (statutes and regulations)	13–18

CITATIONS

Cases:

American Chain Co. v. *Eaton*, 58 F. (2d) 248, reversed, 63 F. (2d) 783 — 7, 10

Boyle Valve Co. v. *United States*, 38 F. (2d) 135 — 10

Electric Storage Battery Co. v. *McCaughn*, 52 F. (2d) 205, affirmed, 63 F. (2d) 715 — 10, 11

Gordon v. *United States*, 2 Wall. 561; 117 U.S. 697 — 10

Hayburn's Case, 2 Dallas 409 — 11

Jefferson Electric Mfg. Co. v. *United States*, 69 C.Cls. 150, certiorari applied for, No. 171, October Term, 1933 — 12

Magone v. *Wiederer*, 159 U.S. 555 — 7

Philadelphia Storage Battery Co. v. *Lederer*, 21 F. (2d) 320 — 7

Sanborn, In re, 148 U.S. 222 — 11

Sterling Spring Co. v. *Routzahn*, VIII-2 Cum. Bul. 358 — 11

Twentieth Century Mfg. Co. v. *Hopkins*, X-2 Cum. Bal. 408 — 11

United States v. *Ferreira*, 13 How. 39 — 11

Universal Battery Co. v. *United States*, 281 U.S. 580 — 6, 7

Weir v. *McGrath*, 52 F. (2d) 201, affirmed, 41 F. (2d) 1021 — 7

Statutes:

Revenue Act of 1921, c. 136, Sec. 900, 42 Stat. 227 — 13

Revenue Act of 1924, c. 234, Sec. 600, 43 Stat. 253 (U.S.C., Title 26, Sec. 881) — 13

Revenue Act of 1928, c. 852, Sec. 424, 45 Stat. 791 — 14

Miscellaneous:

Treasury Regulations 47, Revised December, 1921:

Art. 15 — 15

Art. 16 — 16

Treasury Regulations 47, Revised August, 1924:

Art. 16 — 17

In the Supreme Court of the United States

OCTOBER TERM, 1933

No.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE of the United States for the Eighteenth District of Ohio, petitioner

v.

WILLARD STORAGE BATTERY COMPANY, A Corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General on behalf of C. F. Routzahn, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in the above case May 9, 1933.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Ohio (R. 52) is not reported.[1] The

[1] An opinion overruling motions to dismiss, not in the record, is not officially reported but may be found in 8 Am. Fed. Tax Reports 11274.

opinion of the Circuit Court of Appeals (R. 261) is reported in 65 F. (2d) 89.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 9, 1933 (R. 261). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the chief use of an article may be disregarded in determining whether it is "primarily adapted" for use on automobiles within the meaning of Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924.

2. Whether Section 424 of the Revenue Act of 1928 requires as a prerequisite to a suit for the recovery of taxes that the decision of the Commissioner of Internal Revenue be first obtained with respect to whether or not the taxpayer has borne the economic burden of the tax.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 13–18.

STATEMENT

Five actions at law were commenced in the District Court for the Northern District of Ohio for the recovery of manufacturer's excise taxes paid on the manufacture and sale of electric storage batteries for the taxable periods September 1922 to

February 1926, inclusive, in the aggregate amount of $744,023.58 and interest.

A motion to dismiss was filed in each case (R. 18, 148, 176, 203, 226), upon the ground that the court was without jurisdiction. These motions were overruled and exceptions were noted (R. 19). The five actions were consolidated for trial (R. 26, 151, 179, 207, 230), and the case was tried before the District Court, jury being waived (R. 26, 154, 183, 208) upon stipulations of facts (R. 24, 152, 179, 209, 230), and certain oral testimony and documentary evidence. The court made findings of fact (R. 37), from which the following appears (R. 39–40):

> 9. That none of the storage batteries upon the sales of which the taxes in suit were paid were sold to manufacturers of automobiles, but the majority of them were sold by the plaintiff to jobbers, distributors, and storage battery and electrical service dealers, and the plaintiff does not know, nor can it ascertain, the uses to which the said storage batteries so sold by it were put.
>
> 10. That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally, and commonly sold for many different uses.
>
> 11. That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for many other purposes.

12. That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was not designed specially for use on the automobile.

13. That the parts of the electric storage batteries upon which the taxes in suit were paid were much the same as the parts of the storage batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, the only changes being those naturally due to the refinement in art of manufacture during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same.

14. That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid were commercial commodities which were commonly, generally and widely manufactured and sold for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them not such a commercial article as would ordinarily be sold for general use for a great many different purposes.

15. That the uses of said electric storage batteries, other than the use on automobiles, were not incidental to the use on automobiles.

16. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were

equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used. Nor were they primarily adaptable for use only on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same.

17. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not designed for the special purpose of being used on automobile trucks, automobile wagons, or other automobiles, but were designed for use also for uses in other fields in which electricity in portable form was required. The duty required for use in automobiles was also required in various other uses and the batteries which were applied to these other uses were identical in design with the batteries used in connection with automobiles. Said batteries were just as applicable for one use as for another where the duties required were the same.

Upon these findings the court concluded as a matter of law that the batteries were not parts or accessories within the meaning of the statutes and that the taxes were illegally assessed and collected (R. 41). Judgments were accordingly entered for the respondent (R. 54, 155, 183, 211, 234). The five actions were consolidated for the purpose of

appeal (R. 235), and the Circuit Court of Appeals for the Sixth Circuit affirmed the judgments of the District Court (R. 261).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In ignoring the chief or principal use as being determinative of the question whether the article is primarily adapted for use on automobiles.

2. In sustaining the jurisdiction of the District Court notwithstanding the failure of the respondent to comply with the provisions of Section 424 of the Revenue Act of 1928.

REASONS FOR GRANTING THE WRIT

1. In *Universal Battery Co.* v. *United States*, 281 U.S. 580, this Court approved the rule laid down by the Treasury regulations for determining the taxability of automobile parts and accessories, and said (p. 584):

> We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

Thus the taxability of these articles turns upon whether they are "primarily adapted" for use on automobiles. However, the precise meaning of the term "primarily adapted" is a matter concerning

which there is a diversity of opinion in the courts. In *Eaton* v. *American Chain Co.*, 63 F. (2d) 783 (C.C.A. 2d),[2] the court expressed its view as follows (p. 786):

> We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court, * * *.

This view is in accord with *Magone* v. *Wiederer*, 159 U.S. 555, cited with approval in *Universal Battery Co.* v. *United States, supra*, p. 584. Two District Courts have also adopted this view. See *Weir* v. *McGrath*, 52 F. (2d) 201 (S.D. Ohio), affirmed, *per curiam*, 41 F. (2d) 1021 (C.C.A. 6th), and *Philadelphia Storage Battery Co.* v. *Lederer*, 21 F. (2d) 320 (E.D.Pa.).

In the case at bar the District Court found that the batteries were not primarily adaptable for use only on automobiles. It is clear, however, that the District Court's conception of the term "primarily adapted" is widely at variance with the meaning attributed to it in the *American Chain Co. case.* The District Court found, *inter alia* (R. 39–40) "the storage battery was not *designed specially* for use on the automobile"; "there was no *peculiar characteristic* of these batteries which rendered them not such a commercial article as would ordi-

[2] Petition for a writ of certiorari was filed in this case June 22, 1933, No. 196, October Term, 1933.

narily be sold for general use for a great many different purposes"; they "were not *peculiarly adaptable only* for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used"; "*Nor* were they *primarily adaptable for use only* on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same." (Italics ours.) The record contains no evidence that the other uses called for the same duty requirements.

The court below treated the case as presenting only the questions whether the evidence supports the findings and the findings the judgment (R. 264), and concluded that the findings of the District Court are in response to the evidence and support the judgment (R. 265). Thus it is clear that the court below has sanctioned a definition of "primarily adapted" which ignores the chief or principal use and confines the term to those articles which are peculiarly and exclusively adapted for use on automobiles, and on automobiles only.

There is thus a conflict between Circuit Courts of Appeals as to the meaning to be given to the term "primarily adapted." This is an important question of law which should be settled. Aside from the large amount of taxes involved in this

particular case, there are many other pending cases involving large sums which present the same general question.[1] The question is therefore one of large public interest and of great importance in the administration of the revenue laws.

2. The question of the jurisdiction of the courts in cases arising under Section 424 of the Revenue Act of 1928 (*infra*, pp. 14-15) is of unusual importance. As applied to this case that section requires that no refund shall be made unless it is established to the satisfaction of the Commissioner of Internal Revenue that the taxpayer has borne the economic burden of the tax. It is our view that this statute requires the taxpayer to secure the Commissioner's determination as to that question before suing in the courts to establish that his product is a nontaxable article. If the Commissioner determines that the taxpayer has borne the economic burden of the tax, it would be proper for the court also to inquire whether such action by the Commissioner was arbitrary. Thus all justiciable questions with respect to the refunding of the tax could be decided in one suit.

In this case the taxpayer brought suit in the District Court without attempting to satisfy the Commissioner that it had borne the economic burden of the tax. The court below conceded that "the

[1] The Treasury Department advises that there are 98 cases pending in the courts involving over $5,000,000 in taxes and additional interest of more than $2,000,000.

purpose of the Congress to prevent the manufacturer from enriching himself by recovery of a tax that he has himself not paid but has passed on to the consumer, appears in bold relief" (R. 267), but held that the Commissioner's determination with respect to that matter was to be made after judicial determination of the legality of the tax. In adopting this construction of Section 424, the court relied on *Boyle Valve Co.* v. *United States,* 38 F. (2d) 135 (C.Cls.); *American Chain Co.* v. *Eaton,* 58 F. (2d) 248 (Conn.), reversed on other grounds, *Eaton* v. *American Chain Co.,* 63 F. (2d) 783 (C.C.A. 2d); *Electric Storage Battery Co.* v. *McCaughn* 52 F. (2d) 205 (E.D.Pa.), *affirmed, McCaughn* v. *Electric Storage Battery Co.,* 63 F. (2d) 715 (C.C.A. 3d).

Thus the court below construes this statute as authorizing the Commissioner of Internal Revenue to render its judgment ineffective by his determination that the taxpayer fails to satisfy the requirements of Section 424. By this construction of the statute the court below resolves the jurisdictional question against the Government. However, we submit that this construction raises a graver question than it solves. It is settled that no case or controversy in the constitutional sense is presented where Congress or an administrative officer has power to prevent the payment of a judgment of a Federal court, or where the parties are not concluded by the judgment. *Gordon* v. *United States,*

2 Wall. 561; 117 U.S. 697; *In re Sanborn,* 148 U.S. 222; *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 39. Accordingly, the construction adopted by the court below does not seem to sustain the jurisdiction.

We are advised that the Treasury has withheld payment of the judgment of the court in the *Electric Storage Battery Co. case, supra,* and requested the taxpayer to comply with the provisions of Section 424. The Treasury further advises that its files will require similar action in the instant case. Thus it appears that the judgment below has not fixed the rights of the respondent.

Two District Courts have held that Section 424 deprives them of jurisdiction in suits to recover automobile-accessories taxes. *Sterling Spring Co.* v. *Routzahn* (N.D. Ohio), not officially reported, but see VIII-2 Cumulative Bulletin 358; *Twentieth Century Mfg. Co.* v. *Hopkins* (N.D. Tex.), not officially reported, but see X-2 Cumulative Bulletin 408. The dissenting opinion in *McCaughn* v. *Electric Storage Battery Co.,* 63 F. (2d) 715, expresses the same view. The majority opinion, however, adopts the view that Section 424 is merely an administrative measure for the guidance of the Commissioner and that when recovery is sought by a suit in court rather than administratively, the section prescribes no condition which would prevent recovery. Under this view the question whether the taxpayer bore the economic burden of the tax

would be wholly eliminated from the case. In this respect the court below has adopted a construction of Section 424 which is in conflict with that of the Circuit Court of Appeals for the Third Circuit. It is also in conflict with the construction adopted by the Court of Claims in *Jefferson Electric Mfg. Co.* v. *United States*, 69 C.Cls. 150, in which case the Government has filed a petition for certiorari, No. 171, October Term, 1933.

The construction adopted by the court below is, we submit, erroneous. The proper practice under Section 424 is in much confusion, and the courts are generally reluctant to accept a construction which will deprive them of jurisdiction. Unless this confusion is resolved by a decision of this Court which will establish a settled rule, the diversity of opinion in the lower courts will result in extensive litigation.

Wherefore, it is respectfully submitted that the petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

AUGUST, 1933.

APPENDIX

REVENUE ACT OF 1921, C. 136, 42 STAT. 227, 291

SEC. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

* * * * *

REVENUE ACT OF 1924, C. 234, 43 STAT. 253, 322

SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the fol-

lowing percentage of the price for which so sold or leased.

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. * * *;

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. * * *;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. * * *; (U.S.C., Title 26, Sec. 881.)

REVENUE ACT OF 1928, C. 852, 45 STAT. 791, 806

SEC. 424. REFUND OF AUTOMOBILE ACCESSORIES TAX.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of

the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

TREASURY REGULATIONS 47, REVISED DECEMBER 1921

ART. 15. *Definition of parts.*—A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such ve-

hicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

* * * * *

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

ART. 16. *Definition of accessories.*—An "accessory" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

* * * * *

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as "parts" or "accessories." * * *

If any doubt exists as to the special adaptability of any article, the fact of its sale by the manufacturer to be used with an automobile, or to an

automobile accessories dealer, would determine its taxability.

* * * * * *

TREASURY REGULATIONS 47, REVISED AUGUST 1924

ART. 16. *Parts or accessories—Definition of parts.*—A "part" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair, or replace, a component part of any such vehicle or article, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use or which is primarily adapted only for use as a component part of such vehicle or article.

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use.

* * * * *

Articles which have a general commercial use and which are not especially designed or peculiarly adapted for use in connection with automobile truck, automobile wagon, or other automobile chassis or bodies, or motorcycles, are not subject to tax as "parts or accessories." * * *.

Mere stock or commercial commodities such as bolts, nuts, washers, screws, etc., though used as components for taxable articles, are not "parts"

within the meaning of subdivision (3) when sold separately. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motorcycles, primarily adapted for use on or in connection therewith are taxable when sold by the manufacturer thereof regardless of the purpose for which used.

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